No. 92-1196

(4)

In The

Supreme Court of the United States

October Term, 1993

WALDEMAR RATZLAF AND LORETTA RATZLAF,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTION PRESENTED

To be guilty of "willfully" structuring a transaction in currency "for the purpose of evading" reporting requirements imposed by law upon financial institutions, must a bank customer have knowledge that such "structuring" is prohibited, or is it enough that the defendant knew of the institution's obligations and sought to "frustrate" or circumvent them?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Waldemar and Loretta Ratzlaf and the United States). Ron Hunt was a co-defendant in the district court, but he was acquitted and so was not a party to the appeal or in this Court.

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The Ninth Circuit's opinion (per Poole, J., with Wallace, Ch.J., and Choy, J.) and the Court's accompanying judgment were filed October 6, 1992. The Opinion is published as *United States v. Ratzlaf*, 976 F.2d 1280 (1992); J.A. 51. There is no published opinion of the District Court. The Judgment of the district court (Hon. Edward C. Reed, Jr., Ch.U.S.D.J.), imposing sentence, was dated, as to petitioner Waldemar Ratzlaf, on July 11, 1991, and as to petitioner Loretta Ratzlaf, July 12, 1991. J.A. 31-48.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 6, 1992. On January 4, 1993, Justice O'Connor extended the time for filing a petition for writ of certiorari to and including January 19, 1993. The petition was filed on January 14, 1993. *See* S.Ct. Rules 13.1, 13.2 (1990 rev.). Certiorari was granted on April 26, 1993. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1). J.A. 70.

STATUTES AND REGULATIONS INVOLVED

Due to their number and length, the Statutes and Regulations Involved (31 U.S.C. §§ 5313(a), 5321(a)(4),(a)(6) & (d), 5322(a) & (b), and 5324, 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1) and 1956(a)-(d), and 31 C.F.R. §§ 103.11(e) & (p), 103.21, 103.22(a)(1) & (2), and 103.53) are reproduced in an Appendix to this Brief.

STATEMENT OF THE CASE

This case presents issues of statutory construction arising out of the prosecution and conviction of the petitioners, Waldemar and Loretta Ratzlaf, husband and wife, on charges of structuring currency transactions for the purpose of evading reporting requirements.

a. Procedural History

On November 20, 1990, a federal grand jury sitting in the District of Nevada indicted the petitioners and a third defendant, Ron Hunt. The indictment charges (1) conspiracy, in violation of 18 U.S.C. § 371, to structure and assist in structuring transactions in currency for the purpose of evading reporting requirements, prohibited by 31 U.S.C. §§ 5324(3)[1] and 5322(a) (Count One); (2) four counts of structuring currency transactions to evade reporting requirements, in violation of *id.* §§ 5324(3) and 5322(a) (Counts Two, Three, Four and Five); and (3) interstate travel in aid of racketeering (that is, from Nevada to a bank in California to engage in structuring activity similar to that charged in the other counts), in violation of 18 U.S.C. § 1952(a)(3) (Count Six). J.A. 2-15.

An 11-day jury trial was held in the United States District Court for the District of Nevada. On April 18, 1991, the court ordered dismissal of Counts Two and Three against Ron Hunt. On April 24, 1991, the jury convicted Mr. Ratzlaf on all counts and Mrs. Ratzlaf on the conspiracy and interstate travel charges, acquitting her on the others. The jury acquitted Mr. Hunt on all remaining counts. J.A. 1; *compare* J.A. 58 n.2 (misstating verdict as to Hunt).

Mr. Ratzlaf was sentenced to fifteen months' imprisonment on each count, to run concurrently; three years supervised release; and to pay a fine of $26,300 and special assessments totaling $300. J.A. 31-40. Mrs. Ratzlaf was sentenced to five years' probation on each count, to

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[1] Recently, a new subsection was added to § 5324, resulting in the recodification of this provision as § 5324(a)(3). Annunzio-Wylie Anti-Money Laundering Act of Oct. 28, 1992, Pub.L. 102-550, tit. XV, § 1525(a), 106 Stat. 4064 (effective December 30, 1992). We refer to the anti-structuring provision in this brief by the designation it bore at the time of the offense, trial, and appeal.

run concurrently and to include ten months' home detention, and to pay a $7,900 fine and $100 in special assessments. J.A. 41-48.

At trial, the judge instructed the jury as follows on the structuring charges:

> The essential elements required to be proven beyond a reasonable doubt in order to establish the offenses charged in Counts Two through Five of the indictment, which are violations of Title 31, United States Code, Section 5324(3) and 5322(a) as defined in Title 31, Code of Federal Regulations, Sections 103.21 and 103.22(a)(1), are as follows:
>
> First, the defendants had knowledge of a financial institution's duty to report currency transactions in excess of ten thousand dollars.
>
> Second, with such knowledge, the defendants knowingly and willfully structured or assisted in structuring or attempted to structure or assist in structuring a currency transaction.
>
> Third, the purpose of the structured or attempted transaction was to evade the transaction reporting requirements; and,
>
> Fourth, the structured transactions involved one or more domestic financial institutions.
>
> An act is knowingly – let me start over. An act is done knowingly and willfully for the purposes of Title 31, United States Code, section 5324(3) and 5322(a), if the defendants, with knowledge of a financial institution's duty to report currency transactions in excess of ten thousand dollars, voluntarily or intentionally structured or assisted in structuring or attempted to structure or assist in the structuring [of] a currency transaction with the purpose of evading the currency reporting requirement.
>
> The government does not have to prove that the defendants knew the structuring was unlawful

nor does the government have to prove that the defendants knew of the existence of the law which they are charged with breaking, Title 31, United States Code, sections 5324(3) and 5322(a). However, if a defendant did not have knowledge of a bank's duty to report currency transactions in excess of ten thousand dollars, that may be considered a defense.

It is not a defense that the defendants did not know that structuring itself is a violation of law or of the existence of Title 31, United States Code, sections 5324(3) and 5322(a).

If you find that structuring occurred, and was knowingly and willfully engaged in by defendants for the specific purpose of evading a reporting requirement that was known by the defendants to exist, that is sufficient.

> Only a person who has deliberate intention to frustrate the reporting by the banks can be guilty of the offense of structuring.

J.A. 27-29. Defense counsel objected to this charge on the ground that the instruction did not require the government to prove that the defendants knew that structuring itself was illegal. J.A. 16-26.

On appeal, the Ninth Circuit affirmed. *United States v. Ratzlaf*, 976 F.2d 1280 (1992). The panel held that this Court's decision in *Cheek v. United States*, 498 U.S. 192 (1991), had not overruled the circuit's prior decision in *United States v. Hoyland*, 914 F.2d 1125 (9th Cir. 1990), and that the trial court's instructions to the jury on the elements of the offense had therefore been correct. J.A. 51-69.

On April 26, 1993, in light of the conflict between the Ninth Circuit's opinion and that of the unanimous, *in banc* First Circuit in *United States v. Aversa*, 984 F.2d 493

(1st Cir. 1993),[2] this Court granted the defendant Ratzlafs' petition for certiorari. J.A. 70. Petitioners remain at liberty on their recognizance pending appeal and review by this Court.

b. Statement of Facts

Petitioner Waldemar Ratzlaf owned a restaurant in Portland, Oregon, which generated substantial cash receipts. He also enjoyed legal gambling in Nevada. The events that led to this case began on October 20, 1988, at the High Sierra casino in Reno, Nevada. Mr. Ratzlaf lost $160,000 that evening playing blackjack. The casino, which had increased his credit line from $25,000 to $160,000 earlier that day, granted him one week to repay the loss.

On October 27, 1988, petitioners returned to the High Sierra casino with $100,000 in currency to pay off most of the gambling debt. Casino officials told Mr. Ratzlaf they could not accommodate his insistence that the casino not make any written report of the cash payment, and suggested that he obtain a single cashier's check for the amount due. The casino then made a limousine available to the petitioners and assigned employee Ron Hunt to assist them in obtaining a check locally.

On October 27, 1988, Hunt escorted the petitioners to five different banks in and near Stateline, Nevada, and South Lake Tahoe, California. First (as charged in Counts Two and Three) petitioners went to the First Interstate Bank in Stateline, Nevada. Each purchased from the same teller, with currency, a $9,500 cashier's check made payable to Resorts Reservations (an accommodation account

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[2] Actually, Chief Judge Breyer wrote a concurring opinion, 984 F.2d at 502-03, and Judge Torruella dissented, *id.* at 503-07, solely to emphasize that they would go further in granting relief than the First Circuit majority. However, they did not disagree with the majority on the issue presently before this Court.

with the casino). All that the teller who issued the cashier's checks could remember of the encounter was that she issued both of the checks, that they were purchased with cash, and that each of the Ratzlafs presented identification.

Next (as charged in Counts Four and Five), petitioners stopped at the Nevada Banking Company, also located in Stateline, Nevada. Petitioners and Hunt approached a teller's window. Mrs. Ratzlaf told the teller that she wished to purchase a cashier's check for cash in a specified amount over $10,000; the teller said that an IRS form would have to be filled out. Mrs. Ratzlaf stated that in light of that information she and Mr. Ratzlaf would like two cashier's checks for $9,500 each. The teller checked with her supervisor and told petitioners that for the two checks it would not be necessary to fill out the form. Each of the petitioners then purchased a $9,500 cashier's check from the same teller, made payable to Resort Reservations.

After visiting those two banks, petitioners crossed into California (as charged in Count Six) and stopped at several more banks, where they obtained more cashier's checks.[3] Petitioners then returned to the High Sierra casino and submitted these cashier's checks in partial payment of the gambling debt. However, not all of the $160,000 debt was eliminated. During the following month, Mr. Ratzlaf had three acquaintances acquire cashier's checks for him for $5,000, $5,000 and $7,500 in currency, respectively. Between November 29 and December 5, 1988, the Ratzlafs separately and together used currency to purchase five more cashier's checks, each in amounts less than $10,000, from two other Portland

[3] Only the transactions at First Interstate Bank and at Nevada Banking Company were the subject of the substantive structuring charges in the indictment in this case (Counts Two through Five). The District Court in Nevada lacked venue over the other transactions.

banks. Between October 26 and October 28, however, Mr. Ratzlaf openly engaged in five cash transactions of $20,000 each at different casinos, resulting in the proper filing of CTRs reflective of gambling income.

Mr. Ratzlaf testified at trial that the couple kept gambling winnings and cash revenues from their restaurant hidden in a piece of furniture in their bedroom. There was no evidence, however, that the money used to purchase the cashier's checks involved in this case was obtained illegally.

SUMMARY OF ARGUMENT

"Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime." *United States v. Bailey*, 444 U.S. 394, 403 (1980). Section 5324 of Title 31 prohibits any structuring of a currency transaction "for the purpose of evading" a reporting requirement. Section 5322 makes such conduct a felony if committed "willfully." For a variety of reasons, this "willfulness" element must be construed to require proof of an intentional violation of a known legal duty.

First, unless the term "willfully" is construed to mean "intending to violate a known legal obligation of the defendant," there is no difference between a mere regulatory violation of § 5324(3) and a "willful" violation punishable as a felony. Thus, the decision below violates the basic principle of statutory construction that every word in a statute be given effect. Moreover, in adopting the pre-existing § 5322 as the *mens rea* provision for criminal violations of the newly-created § 5324, Congress must be presumed to have accepted the well-settled judicial construction of the terms, such as "willfully," long contained in § 5322, absent evidence to the contrary. Prior to the enactment of § 5324, the "willfulness" requirement of § 5322 had always been construed to require the defendant's knowledge of the law regarding his or her own legal obligation as well as of the facts constituting the defendant's conduct. The same clause of the statute,

incorporated by reference in two different applications of the same enforcement scheme, ought to mean just one thing.

The crime of structuring currency transactions is not *malum in se* and does not involve highly regulated or highly dangerous activities. Only proof of an intentional violation of a known legal duty imparts to the crime of structuring any morally blameworthy aspect. Neither the clear language of the statute nor other techniques of statutory construction lead inexorably to the conclusion that Congress intended criminal liability for structuring to exist without knowledge of one's legal obligations. In addition, interpreting the statute to require proof of such knowledge avoids two constitutional questions that would otherwise arise.

Requiring the government to prove knowledge of the defendant's legal obligation, as a component of "willfulness," would not frustrate the congressional purpose behind the anti-structuring statute. Providing notice of the law at financial institutions would only discourage people from structuring transactions. Moreover, the law requires a "purpose of evading" the reporting requirements. The term "evading" is not synonymous with "avoiding" in conventional legal parlance, and should not be so construed.

Examination of the entire statutory scheme, including related statutes enacted at the same time, also leads to the conclusion that "willfully" means "with intent to violate a known legal duty." Only that construction places a criminal violation of the anti-structuring law above a civil violation in terms of seriousness, while ranking it below criminal money laundering. The legislative history does not support the application of a lower standard of intent, but rather shows that Congress concentrated on making the act of structuring an offense, while rejecting efforts to reduce the existing standard of *mens rea*.

Finally, even if prejudice would have to be shown, the error in instructing the jury in this case was both inherently and actually prejudicial.

ARGUMENT

A PERSON CANNOT "WILLFULLY VIOLATE" THE ANTI-STRUCTURING PROVISION OF THE BANK SECRECY ACT WITHOUT HAVING KNOWLEDGE THAT STRUCTURING FOR THE PURPOSE OF EVADING THE ACT'S CURRENCY TRANSACTION REPORTING REQUIREMENT IS PROHIBITED.

A provision of the Bank Secrecy Act of 1970 makes it a felony offense, punishable by up to five years in prison and a quarter million dollar fine, for a person "willfully" to violate "this subchapter," that is, Subchapter II of Chapter 53 of the Act, 31 U.S.C. §§ 5311 through 5326, "or a regulation prescribed under this subchapter." 31 U.S.C. § 5322(a).[4] Stat. App. 3. One statute in that subchapter, *id.* § 5324(3), added in 1986, Pub.L. 99-570, § 1354(a), 100 Stat. 3207-22,[5] states that no one may "structur[e] or assist

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[4] In addition, under 18 U.S.C. § 982(a)(1), a criminal forfeiture attaches to a conviction for this offense. If the offense is committed "as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period" then the penalty is raised to a maximum of ten years' imprisonment and a $500,000 fine. 31 U.S.C. § 5322(b). Whether these additional elements of proof must be determined by the jury or constitute merely sentencing factors is a difficult issue of interpretation that is not presented in this case.

[5] The anti-structuring statute, 31 U.S.C. § 5324, became effective January 27, 1987, three months after enactment. Pub.L. 99-570, § 1364(a). The statute, known as the Anti-Drug Abuse Act of 1986, was signed into law on October 27, 1986. See *Gozlon-Peretz v. United States*, 498 U.S. 395 (1991).

in structuring, or attempt to structure or assist in structuring any transaction" with a bank (or other domestic financial institution) "for the purpose of evading the reporting requirements" of the Act. Stat. App. 4. The Act, in turn, merely requires compliance with regulations defining the duties of financial institutions. 31 U.S.C. § 5313(a). Stat. App. 1. One of these, contained in 31 C.F.R. § 103.22(a)(1), is a rule that the bank must file a Currency Transaction Report ("CTR") with the IRS concerning any cash transaction involving more than $10,000. Subsection 103.22(a)(1) of the regulations also contains the "aggregation rule," which provides that for purposes of the reporting requirement all transactions on behalf of a single principal occurring during a single business day at a single financial institution be treated as one. Stat. App. 14-15.

In this case, concerning the provision of 31 U.S.C. § 5322(a) that a violation of § 5324 constitutes a criminal offense only if the violator acts "willfully," the trial judge charged the jury, over defense objection, that the petitioners need only have had "knowledge of a financial institution's duty to report currency transactions in excess of ten thousand dollars" and then to have "voluntarily or intentionally structured or assisted in structuring or attempted to structure or assist in the structuring [of] a currency transaction with the purpose of evading the currency reporting requirement." The court specifically instructed the jury:

> The government does not have to prove that the defendants knew the structuring was unlawful nor does the government have to prove that the defendants knew of the existence of the law which they are charged with breaking. . . .
>
> • • • •
>
> Only a person who has deliberate intention to frustrate the reporting by the banks can be guilty of the offense of structuring.

J.A. 28, 29. Thus, the lower court instructed the jury that the only knowledge required to convict was the defendant's awareness of the bank's obligations, coupled with an intent to "evade" or "frustrate" the bank's duty to file a report. The decision below, affirming the convictions returned under these instructions, eliminates all meaning from the "willfulness" element of the offense, and erroneously substitutes an avoidance standard for the statute's requirement of intent to evade.

None of the key terms in this case – "structure," "transaction," "evading" or "willfully" – is defined in the statute. See *id.* § 5312 (definitions). The meaning of the plain language of section 5322 – "willfully violating this subchapter" – is not clear, standing alone. Literally, that phrase could mean either "deliberately doing what one knows to be in violation of this subchapter," or it could mean "deliberately doing the acts which happen to be prohibited by law under this subchapter." See *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 561-63 (1971) (discussing meaning of "knowledge" in statute penalizing one who "knowingly violates any such regulation"). Congress has shown several times that it can, when it chooses, make the term "willfully" clearly modify actions, rather than violations of provisions.[6] That Congress chose "willfully violate" language for § 5322 might be taken to demonstrate its intent that one must be willful as to the fact that one is violating a section of the law, rather than that one be willful simply as to the act itself. A variety of approaches to resolution of the ambiguity all support that conclusion: to "willfully violate" in

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[6] See, *e.g.*, 47 U.S.C. § 501 ("any person who willfully and knowingly does . . . any act, matter, or thing, in this chapter prohibited or declared to be unlawful"); 15 U.S.C. § 1990(c) ("any person who knowingly and willfully commits any act . . . that violates any provision"); 40 U.S.C. § 1472(1)(2) ("whoever willfully . . . shall commit an act prohibited").

this statute means to commit a deliberate violation of a known legal duty.

The jury instructions in this case fell short of this standard. Accordingly, the judgment of the court below, and the petitioners' convictions, must be reversed.

A. Interpreting "Willfully" as Requiring Knowledge of One's Legal Obligations Is Necessary to Prevent the Element From Being Rendered Meaningless.

An intent to evade the reporting requirement of § 5313 is an element of the crime of structuring, found within the terms of § 5324(3) itself. In addition to that element is another: the willfulness requirement of § 5322. Unless "willfully" means "intending to violate a known legal obligation of the defendant" there is no difference between a mere regulatory violation of § 5324(3) itself and a "willful" violation that is punishable as a crime. Yet Congress clearly envisioned that there was a difference. As the First Circuit recognized, "there would have been no need for Congress to include the term 'willfully' at all if the government's reading of section 5322 were accurate." *Aversa, supra*, 984 F.2d at 497 n.6. Congress would simply have criminalized violations of § 5324(3) without more.

The decision below, following the leading case opposing *Aversa*'s analysis, *United States v. Scanio*, 900 F.2d 485 (2d Cir. 1990), does not respond to this argument. Indeed, the Ninth Circuit precedent followed by the court below implicitly concedes that its interpretation renders the term superfluous. "Congress changed the law to make it a crime so to structure with the intent to prevent reporting. To act willfully under the statute is to act with this intent." *Hoyland, supra*, 914 F.2d at 1129. See also *United States v. Pitner*, 979 F.2d 156, 161 n.5 (9th Cir. 1992) (referring to "the redundant language of 5322(b) and 5324(3)"). But as this Court held a century ago,

determining the meaning of "willfully violate" in a federal criminal statute:

> The word 'wilful' is omitted from the description of offences in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something. It implies on the part of the [accused] knowledge and a purpose to do wrong. Something more is required than an act . . . without any purpose to evade or disobey the mandates of the law.

Potter v. United States, 155 U.S. 438, 446 (1894) (spelling as in original).

The structure of Chapter 53, Subchapter II, of the 1970 Act has been a significant factor for several courts interpreting provisions of the Subchapter where willfulness was not required, as for civil forfeiture under 31 U.S.C. § 5317 (funds not reported upon export or import). In accordance with the forfeiture statute's plain language, the majority of circuits have concluded that no knowledge of the reporting requirement is necessary to establish a civil forfeiture under § 5317(c), even though it is necessary for criminal conviction under sections 5316 and 5322. *United States v. $47,980 in Canadian Currency*, 804 F.2d 1085, 1090 (9th Cir. 1986); *United States v. $122,043 in U.S. Currency*, 792 F.2d 1470, 1474 (9th Cir. 1986). "Congress could have used identical language in both the civil forfeiture and criminal provisions. The fact that it chose not to do so must be given heed." *United States v. $359,500 in U.S. Currency*, 828 F.2d 930, 933 (2d Cir. 1987).

The same analysis applies to structuring. When Congress enacted § 5324(3), it also created 18 U.S.C. § 981(a), allowing forfeiture of structured funds upon proof of any violation of § 5324. This section stands in contrast to § 5322, which criminalizes only "willful" violations of § 5324(3), and even to § 5321, which permits the imposition of a civil penalty only upon proof of a "willful" violation. Since non-willful violations require an intent to

evade reporting requirements under the language of § 5324 itself,[7] willful violations necessarily require more.

As this Court recently ruled in the context of civil enforcement of the Fair Labor Standards Act, "The fact that Congress . . . adopted a two-tiered statute . . . makes it obvious that Congress intended to draw a significant distinction between ordinary violations and willful violations." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132 (1988). This Court rejected as necessarily wrong a "standard of willfulness [that] virtually obliterates any distinction between willful and nonwillful violations." *Id.* The *Scanio* type of analysis is actually less plausible than that condemned in *McLaughlin*, because it totally, rather than "virtually," obliterates the distinction between willful and nonwillful violations of § 5324(3). Because it fails this basic test of statutory construction – the requirement that every word be given effect, if possible[8] – the decision below must be reversed.

B. In Selecting the Willfulness Element Already Contained in 31 U.S.C. § 5322 to Apply to the Newly-Created Structuring Offense in § 5324, Congress Must Be Deemed to Have Adopted Its Settled Construction as Requiring a Knowing Violation by the Defendant of His Legal Obligations.

Prior to the 1986 enactment of § 5324, the "willfulness" requirement of § 5322(a) and (b) consistently had

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[7] See *United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir. 1992) (§ 5324's requirement of "intent to evade" a reporting requirement demands proof that alleged violator knew CTR filing was required by law and not merely by bank policy).

[8] See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

been construed to require knowledge of the law regarding the defendant's own legal obligation as well as of the facts constituting the defendant's conduct. In prosecutions under § 5322 of financial institutions for directly violating 31 U.S.C. § 5313(a), it was settled by 1986 that the government had to prove "that the defendant acted with knowledge of the requirements of the law and willfully failed to obey it." John K. Villa, Banking Crimes § 6.05[1][b][iii], at 6-60 (Dec. 1992 rev.); see *United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984).

Likewise, the circuits consistently had demanded proof of knowledge that one's conduct was prohibited in cases of failure to declare possession of more than $5000 (later raised to $10,000) in currency while crossing an international border. See *id.* § 6.05[1][a][iii], at 6-53 & n.12 (collecting cases under 31 U.S.C. § 5316; *e.g.*, *United States v. Dichne*, 612 F.2d 632, 636 (2d Cir. 1979); *United States v. Granda*, 565 F.2d 922, 926 (5th Cir. 1978) (willfulness requires knowledge of the reporting requirement).[9] See also *United States v. Sturman*, 951 F.2d 1466 (6th Cir. 1991) (failure to maintain records and file reports of foreign monetary transactions under *id.* § 5314, punishable under § 5322; "willfulness" requires knowledge of one's legal obligation). In adopting this provision as the *mens rea* for criminal violations of the newly-created § 5324, Congress must be presumed to have adopted the well-settled judicial construction of the terms, such as "willfully," long contained in § 5322.

The First Circuit's *in banc* decision in *Aversa* properly relies heavily on this point:

> Ascribing various meanings to a single iteration of a single word – reading the word differently for each code section to which it applies – would open Pandora's jar. If courts can render meaning

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[9] For discussion of the elements of the § 5316 offense, see generally *United States v. Woodward*, 469 U.S. 105 (1985) (per curiam).

so malleable, the usefulness of a single penalty provision for a group of related code sections will be eviscerated and, by extension, almost any code section that references a group of other code sections would become susceptible to individuated interpretation.

Furthermore, if Congress wanted the purposive mens rea in the antistructuring statute to stand alone, it had several simple options. It could, for example, have placed the antistructuring provision somewhere other than in Subchapter II, or amended the criminal sanctions provision to except structuring violations.[7] It exercised none of the available options. Thus, absent powerful evidence to the contrary, we believe courts should presume that Congress intended the mens rea set by section 5322 to apply in equal measure to both CTR violations and structuring offenses.

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[7] In fact, Congress chose precisely this course for the provision requiring reports on foreign currency transactions, 31 U.S.C. § 5315, leaving only civil penalties available for enforcement of that provision. See 31 U.S.C. § 5322(a)-(b).

984 F.2d at 498-99 & n.7.[10] Neither the court below nor any of the other cases in the circuits which follow *United*

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[10] In *United States v. Bank of New England*, 821 F.2d 844, 854 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987), subsequent to the enactment of § 5324, the First Circuit had held in a prosecution for violating § 5313 that "willfulness" could be proved by showing either knowledge of the law or a reckless disregard of its provisions.

States v. Scanio, supra, 900 F.2d 485, the leading case contrary to *Aversa*, explain how "willfully" can mean two different things in one occurrence. The closest any of the cases comes to even discussing this point is *Scanio* itself. But all the Second Circuit does is acknowledge the differing meanings and state a policy reason why Congress *might* wish to impose different mental elements for the two crimes. 900 F.2d at 484-85. Nothing in the language of § 5322 shows that Congress did *in fact* impose different elements. Nor does *Scanio* address the point made in *Aversa* – that although Congress might want to impose different elements for violations of different provisions, the structure of the Subchapter shows that it did not do so.

Curiously, the court below spoke of "the distinction between 'willful' as used in section 5324(3) and as employed in 31 U.S.C. § 5316. . . . " *Ratzlaf, supra*, 976 F.2d at 1284 n.4; J.A. 61. But "willfully" does not appear separately in each of those sections, such that it arguably might have a different meaning in each. It appears only once, in § 5322, where it must have just one meaning. As this Court recently has noted, "Our normal canons of construction caution us to read the statute as a whole, and, unless there is a good reason, to adopt a consistent interpretation of a term used in more than one place within a statute." *United States v. Thompson/Center Arms Co.*, 504 U.S. ___, 112 S.Ct. 2102, 119 L.Ed.2d 308, 316 n.5 (June 8, 1992) (plurality). *A fortiori*, the same clause of the statute, incorporated by reference in two different applications of the same enforcement scheme, ought to mean

just one thing. See *United States v. Murdock*, 290 U.S. 389, 395 (1933) ("the other omissions which the statute denounces in the same sentence only if willful, aid in ascertaining the meaning [of that term] as respects the offense here charged").

In the absence of evidence to the contrary, the inference is compelling that the meaning of "willfully" in § 5322(a) and (b) does not change when attached to a structuring violation under § 5324 from that which it has when applied to a violation of sections 5313, 5314 or 5316. In those cases, it means "intentionally violating a known legal duty." The same is the correct construction here, in the context of section 5324.

C. An Interpretation of "Willfully" as Requiring Knowledge of One's Legal Obligations Is Necessary for the Defendant's Conduct to Be Properly Treated as Morally Wrongful.

It goes without saying that if an offense is *malum in se*, a punishable intent to do wrong inheres in the defendant's voluntarily engaging in the conduct, knowing the nature of the act. The crime of structuring currency transactions, however, is plainly not of that nature. There is deeply embedded in our legal tradition the idea that criminality without consciousness of wrongdoing is a rare exception, and not to be deemed to be the will of Congress unless either clear language or other techniques of statutory construction lead inexorably to that conclusion. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436-38 (1978). See generally *United States v. Bailey*, 444 U.S. 394, 403-06 (1980). Application of that principle also supports a reversal of the Ninth Circuit's decision below.

1. Intent to violate a known legal duty is a common mental element for *malum prohibitum* felonies not involving highly regulated or inherently dangerous activities.

This Court and others have ruled repeatedly that when Congress imposes a *scienter* element for crimes in the nature of *malum prohibitum*, knowledge of the nature of the prohibition is required unless the case falls into one of two exceptional categories. First, knowledge of the facts alone may be enough if the activity is inherently dangerous, so that it can properly be thought that Congress intended to impose a high level of self-restraint by making participants act at their peril. See *United States v. Freed*, 401 U.S. 601 (1971) (possession of unregistered hand grenade); *United States v. Balint*, 258 U.S. 250 (1922) (sale of narcotics without required order form). The anti-structuring law is not of that kind. *See* Sarah N. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 Fla.L.Rev. 287, 313 (1989).

The second exception exists where the offense is applicable only to a class of persons who are knowingly engaged in a highly regulated business (whether or not dangerous). See *International Minerals & Chemical Corp., supra; Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952) (knowledge of the facts all that is required for environmental safety infractions); see also *United States v. Park*, 421 U.S. 658 (1975); *United States v. Dotterweich*, 320 U.S. 277 (1943) (strict liability for Pure Food and Drug violations upheld, subject to impossibility defense). Being a bank customer (as opposed to being a banker or a bank) does not put one into such a class of persons.

In *malum prohibitum* cases not falling into either of these exceptional categories, however, including but not limited to criminal tax cases, the federal courts have consistently resolved any ambiguities in Congress's specification of the *mens rea* in favor of the highest level of

scienter – intentional violation of a known legal duty.[11] The reason is clear: without that knowledge, there is no blameworthy consciousness of wrongdoing. This standard was authoritatively established for tax cases in *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (per curiam). In *Cheek v. United States*, 498 U.S. 192 (1991), this Court applied that ruling to reverse a conviction arising out of a prosecution for tax evasion and failure to file a return, where the defendant claimed he did not know that his wages were taxable as "income" under the Internal Revenue Code and the jury instructions had required any such belief to be found "reasonable" before it could establish a defense.

Several courts have contended that *Cheek* supports the result reached in this case below, because of this Court's observation that, in general, "ignorance of the law or a mistake of law is no defense to criminal prosecution. . . . " 498 U.S. at 199. But *Cheek* itself involved "an exception to the traditional rule," *id.* at 200, and that exception is not *sui generis*. See *United States v. Freed*, 401 U.S. 601, 615 n.6 (1971) (Brennan, J., concurring); 1 ALI, Model Penal Code and Commentaries, pt. I, § 2.02, at 250-51 (1985); Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law § 5.1(d), at 585 (1986) (discussing when knowledge of law is required).

Certainly this Court in *Cheek* did not mean to hold that knowledge of a legal provision is never an element of

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[11] There was, until 1976, an arguably higher level of willfulness required in many criminal cases – the "bad purpose" or "evil motive" test adopted in *Murdock*, *supra*, and earlier cases cited there. *See* Note (S. Brogan, student author), *An Analysis of the Term "Willful" in Federal Criminal Statutes*, 51 Notre Dame Law. 786, 788-91 (1976). In *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (per curiam), explaining and rejecting some ambiguity and dictum in *United States v. Bishop*, 412 U.S. 346 (1973), this Court unanimously for all practical purposes appears to have abandoned permanently all uses of that test.

a crime outside the tax code. The wide variety of statutes in which courts have found such an element to exist – either by construing a "willfulness" element or even, sometimes, a "knowledge" requirement – belies the lower courts' attempt to read *Cheek* in that manner.[12] In *Liparota v. United States*, 471 U.S. 419 (1985), this Court held that a statute making it an offense knowingly to acquire food stamps in a manner unauthorized by law made knowledge of whether one's manner of acquisition was authorized a required element of proof. As the Court said, "This construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id.* at 426. The same test of willfulness applies to other *malum prohibitum* offenses where felony penalties apply, whether or not the proscribed conduct is facially "innocent."

Examples can be multiplied. *See* 22 U.S.C. § 2778(c) (exportation of armaments; "any person who willfully violates any provision of this section"); see *United States v. Golitschek*, 808 F.2d 915 (2d Cir. 1986); *United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 828 (9th Cir. 1976) (willfulness requires proof of defendant's "specific intent to do or fail to do what he knows is unlawful"); *United States v. Adames*, 878 F.2d 1374, 1377 (11th Cir. 1989); *United States v. Davis*, 583 F.2d 190, 193 (5th Cir. 1978); 50

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[12] Although the claim also has been made in a number of recent cases, including by the court below, that the "violation of a known legal duty" definition of willfulness is somehow "unique" to "complex" tax cases, this view is simply unsupportable. A wide variety of non-tax *malum prohibitum* crimes involving an intent to violate the requirements of a different body of law employ the same definition. In any event, it is ludicrous to suggest that the particular law involved here is any less "complex" than the specific law involved in *Cheek*, which merely requires that a tax return be filed when a person earns more than a certain amount of gross income, or that the whole body of currency transaction laws is not as difficult to understand and obey as the tax code.

U.S.C. Appx. § 5 (Trading with the Enemy Act) ("whoever shall willfully violate any of the provision of this Act . . . "); *United States v. Frade*, 709 F.2d 1387, 1392 (11th Cir. 1983) (willfulness requires awareness that activities are regulated); *United States v. Tooker*, 957 F.2d 1209 (5th Cir. 1992); 50 U.S.C. Appx. § 462(a) (criminal penalties provision of Military Selective Service Act); *United States v. Kerley*, 838 F.2d 932, 936, 942 (7th Cir. 1988) (Posner, J.); *United States v. Schmucker*, 815 F.2d 413, 421 (6th Cir. 1987) ("The term 'willfully' . . . require[s] proof of . . . an intentional violation of a known legal duty."); *United States v. Rabb*, 394 F.2d 230, 231-32 (3d Cir. 1968) (same).

Further examples abound. *See* 45 U.S.C. § 152 (Railway Labor Act; "the willful failure or refusal . . . to comply with the terms of . . . this section"); *United States v. Winston*, 558 F.2d 105, 108 (2d Cir. 1977) (conduct must constitute a "voluntary, intentional violation of a known legal duty"); 49 U.S.C. § 1472(a) (federal aviation regulations; "any person who knowingly and willfully violates any provision of this chapter"); *United States v. Eastern Airlines*, 192 F.Supp. 187, 192 (S.D.Fla. 1961) (requiring "conscious and deliberate intent to disobey"). The *Pomponio* definition of willfulness also applies, in effect, to criminal civil rights cases, as construed in *Screws v. United States*, 325 U.S. 91 (1945) (plurality), where a specific intent to violate an established constitutional right must be proved. See also *United States v. North*, 910 F.2d 843, 884-88 (D.C. Cir. 1990) (per curiam) (relationship of authorization defense to proof of 18 U.S.C. § 2071(b) violation, requiring proof of subjective knowledge of illegality), *reaff'd on denial of reh'g*, 920 F.2d 940, 949-50, *cert. denied*, 111 S.Ct. 2235 (1991); *but see* 920 F.2d at 959-60 (R.B. Ginsburg, J., dissenting from denial of rehearing in banc).

The *Scanio* cases, such as the decision below, almost all rely on Judge Learned Hand's observation in *American Surety Co. v. Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925), that in general the term "willfully," "even in criminal statutes, means no more than that the person charged with the

duty knows what he is doing." J.A. 67 n.8. But *American Surety's* claim that "willfully" generally means no more than "knowingly" was not true then[13] and is not true now outside the realm of *malum in se* offenses.[14]

In *Hazen Paper Co. v. Biggins*, 507 U.S. ___, 123 L.Ed.2d 338, 349-51 (April 20, 1993), this Court reaffirmed

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[13] This Court stated in *United States v. Murdock*, 290 U.S. 389 (1933):

> The word ['willful'] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with bad purpose, without justifiable excuse, stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.

Id. at 394-95 (citations omitted). See *Trans World Air Lines, Inc. v. Thurston*, 469 U.S. 111, 126-27 (1985) (discussing conventional view of "willfulness" in 1930's, citing *Murdock* as example). *Murdock* was a criminal tax case, but this Court's observation there about the meaning of "willful" in criminal statutes was not limited to tax cases. See, *e.g.*, *Spurr v. United States*, 174 U.S. 728, 734-35 (1899); *Potter v. United States*, 155 U.S. 438, 446 (1894); *cf. Felton v. United States*, 96 U.S. 699, 702 (1878) (civil penalty statute). The definition this Court pronounced in *Murdock* carries at least as much weight as the *obiter* generalization in *American Surety*, which was not a criminal case at all, but a civil suit for damages.

[14] *American Surety* was written by a jurist with an expressed hostility to use of the term "willfully." Judge Hand described it 30 years later as a "very dreadful word," an "awful word," which would "lead all the rest" in being purged from the index if he could. *Hoyland*, 914 F.2d at 1129; *Aversa*, 984 F.2d at 497 n.5, *both quoting* 1 ALI, Model Penal Code and Commentaries, pt. I, § 2.02, at 249 n.47 (1985) (setting out a 1955 exchange between Judge Hand and Professor Wechsler); *see also* Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law § 3.4(d), at 299 (1986) (noting ambiguity of term "willfully").

its adoption for purposes of certain civil penalty statutes of a definition of "willfulness" that covers both actual knowledge of the pertinent prohibition and also "reckless disregard for the matter of whether [one's] conduct was prohibited." *Id.* at 349. The Court described that standard as "consistent with the meaning of 'willful' in other criminal and civil statutes." *Id.* The *in banc* First Circuit had adopted this test in *Aversa, supra,* construing "willfully" under 31 U.S.C. § 5322 as applied to structuring violations prosecuted under § 5324, and announced that it would apply the same standard to all applications of § 5322. 984 F.2d at 498-500.

While the petitioners would be entitled to reversal were this Court to adopt that standard, and we do not disavow it, we suggest that it is not as supportable as the *Pomponio/Cheek* test. There is no evidence or reason to believe that Congress intended, either in 1970 or in 1986, to adopt that standard as the meaning of "willfully" for criminal cases under § 5322.[15] Contrary to the implication of this Court's dictum, there are very few kinds of

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[15] The First Circuit suggested that a "recklessness" alternative had to be included with its "willfulness" standard in order to preserve a "willful blindness" rule, but that concern is not well founded. "Willful blindness" is a rule of law that allows a jury to accept as proof of "knowledge" evidence of a "conscious purpose to avoid learning the truth" coupled with awareness of "a high probability of that truth." *United States v. Caminos,* 770 F.2d 361, 365 (3d Cir. 1985); accord, *United States v. One 1989 Jeep Wagoneer,* 976 F.2d 1172 (8th Cir. 1992). See *Spurr v. United States,* 174 U.S. 728, 735 (1899); *United States v. Jewell,* 532 F.2d 697 (9th Cir.) (in banc), *cert. denied,* 426 U.S. 951 (1976). Under these cases, any test that requires "knowledge," including that sought by the petitioners, will allow proof of "willful blindness" to substitute. A separate, diluted "recklessness" standard – which eliminates the requirement of showing a conscious purpose to avoid learning the truth – is not needed for this purpose.

criminal cases, mainly in labor law enforcement,[16] to which it has been applied in recent years.[17]

To adopt the First Circuit's test in this context would only further confuse the law of *mens rea* by importing into criminal law what has basically become a civil standard. John K. Villa, *A Critical View of Bank Secrecy Act Enforcement and the Money Laundering Statutes,* 37 Cath.U.L.Rev. 489, 499 n.75 (1988). Where, as here, "willfulness" means more than acting with knowledge of the facts making the conduct wrongful, "intentional violation of a known legal duty" is the criminal standard.

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[16] *See* 29 U.S.C. § 439 (labor-management reporting and disclosure; "any person who willfully violates this subchapter"); *United States v. Otley,* 509 F.2d 667, 672 (2d Cir. 1975) (willfulness requires knowledge of law or action "in reckless disregard of the law's requirement"); 29 U.S.C. § 216(a) (fair labor standards; "any person who willfully violates any of the provisions"); *Nabob Oil Co. v. United States,* 190 F.2d 478, 479-80 (10th Cir.), *cert. denied,* 342 U.S. 876 (1951) (defendant not guilty "unless he is either conscious of the fact that what he is doing constitutes a violation of the Act or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law"); 29 U.S.C. § 666(e) (Occupational Safety and Health Act) ("Any employer who willfully violates any standard"); *United States v. Dye Construction Co.,* 510 F.2d 78, 82 (10th Cir. 1978) (defendant must intentionally disregard the standard or be plainly indifferent to its requirement).

[17] In the case on which *Hazen Paper* relied, *Trans World Air Lines, Inc. v. Thurston,* 469 U.S. 111, 126 (1985), this Court pointed to *Murdock, supra,* as an example of the application of this test in a criminal case. The Court's citation of *Murdock* in this regard is puzzling, as *Murdock* was plainly overruled (or at least explained away) in *Pomponio, supra,* and *Cheek, supra,* and replaced with a pure "knowledge of the law" standard.

2. The intentional violation of a known legal duty is the only morally blameworthy aspect of structuring, and interpreting the statute to require such proof avoids two constitutional questions that would otherwise arise.

As defined by the Treasury Department's regulations, and as generally applied by the courts of appeals, to "structure" one's transactions to "evade" the reporting requirements imposed on financial institutions by 31 C.F.R. § 103.22(a)(1) means no more than to arrange one's dealings with the institution so as to *avoid* those requirements. See *id.* § 103.11(p).[18] If this standard is correct, then the only morally culpable conduct involved in the § 5324 offense lies in the "willfulness" element. As Justice Souter recently has emphasized:

> We do not accept the Government's suggestion . . . that [a revenue statute should be broadly construed] because otherwise manufacturers will be able to 'avoid the tax' . . . [If the tax at issue applies to disassembled as well as assembled firearms, f]ailure to pay the tax on such a kit would amount to evasion, not avoidance. In our system, avoidance of a tax by remaining outside the ambit of the law that imposes it is every person's right.

United States v. Thompson/Center Arms Co., 504 U.S. ___, 112 S.Ct. 2102, 119 L.Ed.2d 308, 315 n.4 (June 8, 1992)

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[18] This is apparent from the structuring regulation's explicit coverage of transactions "at one *or more* financial institutions" and "on one *or more* days" and involving amounts "*at or below* $10,000," where the reporting regulation itself, *id.* § 103.22(a)(1), is limited to transactions exceeding $10,000 at one institution on the same business day. In short, simply by arranging for a transaction to be at or below the $10,000 nonreportable limit one can, under this regulation, run afoul of the "structuring to evade" prohibition.

(plurality opinion).[19] In short, avoidance of the application of governmental regulations is not inherently blameworthy. Under the Treasury's construction of the anti-structuring law, culpability enters the picture only through the "willfulness" element.

In § 5324(3), Congress has prohibited acting with the intent to "evade" the reporting requirements. If by that language it meant to prohibit avoidance as well, then "avoidance of [the reporting requirements] by remaining outside the ambit of the law that imposes [them] is [no one's] right." In part D.2. of this Brief, petitioners suggest that the prevailing (and official regulatory) construction of the "purpose of evading" element must be wrong. The point here, however (regardless of the contention advanced below), is that it is embedded in our legal culture – particularly as regards financial and tax-related regulations – that if one can arrange one's affairs so as not to implicate a rule that one wishes to avoid, then one has done no moral wrong.

In *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993), the court recently reversed a conviction for conspiring to defraud the United States. The government had argued that "people have a duty 'not to conduct their business affairs in such a manner that the IRS would be impeded and impaired in its . . . collection of revenue.'" *Id.* at 1059. The court rejected that position and reversed the convictions. Judge Kozinski's eloquent opinion states:

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[19] As Justice Holmes wrote for a majority of this Court (apparently using the term "evade" to mean "avoid"): "The fact that [the petitioner oil company] desired to evade the law, as it is called, is immaterial [to the question whether its transactions were subject to a state tax], because the very meaning of a line in the law is that you intentionally may go as close to it as you can, if you do not pass it." *Superior Oil Co. v. Mississippi ex rel. Knox*, 280 U.S. 390, 395-96 (1930).

> There are places where, until recently, 'everything which [was] not permitted [was] forbidden. . . . ' Fortunately, the United States is not such a place, and we plan to keep it that way. If the government wants to forbid certain conduct, it may forbid it. . . . But we won't lightly infer that . . . Congress meant to forbid all things that obstruct the government. . . . So long as they don't act dishonestly or deceitfully, and so long as they don't violate some specific law, people living in our society are still free to conduct their affairs any which way they please.

Id. at 1061; *accord, United States v. Mastronardo*, 849 F.2d 799, 805 (3d Cir. 1988) ("frustrating the intent of Congress is not criminal").

Of course, there is now a "specific law" requiring people not to conduct their transactions in a manner to defeat the IRS's collection of information about cash deposits. But as *Caldwell* makes clear, the presumption in this country is that individuals and businesses may use the form of their transactions to avoid particular regulatory requirements. Given that presumption, it indeed poses a trap for the unwary to punish attempted circumvention of a regulation, absent proof of knowledge that circumvention is prohibited. Thus, if the "purpose of evading," as used in this statute, connotes no more than avoidance, it imputes no morally culpable conduct, and the punishment-worthy *scienter* must lie in the element of "willfulness."

The reporting requirement imposed on financial institutions is simply to obey the Treasury regulations promulgated under that section. 31 U.S.C. § 5313(a). Stat. App. 1. The key regulation, in turn, 31 C.F.R. § 103.22(a)(1), requires a bank to report (that is, to prepare and file a "CTR" about) any transaction in currency exceeding $10,000. The regulation further requires the bank to aggregate (and thus treat as a single transaction) all transactions of which it has knowledge "by or on

behalf of" the same person, occurring at any branch of the institution on a single business day. Stat. App. 14-15. Thus, a financial institution commits no violation of its reporting obligation under the Bank Secrecy Act by filing no CTR if it lacks knowledge, or if a customer who engages in a transaction involving less than $10,000 in currency also engages in such a transaction at another institution, or on another day, that would bring the total currency involved to more than $10,000.[20]

When customers, knowing (or thinking they know) the limitations of § 103.22(a)(1), arrange their banking so that no obligation to report arises, they would not ordinarily, in the context of American legal culture, be thought of as doing anything wrong.[21] In a free country, it cannot be considered morally suspect to wish to keep personal information out of government files. Nor is a concern for financial privacy the only legitimate reason deliberately to keep one's cash deposits lower than

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[20] The bank may, however, have a duty imposed by its governing regulatory agency, the Federal Reserve or FDIC, to file a report of some other kind. *See* BSA Treasury Ruling 88-1 (June 22, 1988), *reprinted as* Appendix to 31 C.F.R., part 103; 12 C.F.R., part 353 & Appendix A; *cf. id.* § 208.14 (FDIC requirement for BSA compliance program); *id.* § 326.8 (equivalent Federal Reserve regulation).

[21] This is certainly so, at least, where the customer's arrangements seek to avoid implicating the "one day" or "one bank/all branches" components of the aggregation rule. It is a closer case where the customer seeks to avoid the bank's obligation to report by attempting to see that the bank does not "ha[ve] knowledge" of the facts that would require it under the regulation to aggregate. None of the "structuring" counts in this case are of that kind, however. At both of the banks involved in Counts Two, Three, Four and Five, for all the evidence shows, the petitioners went together to the same teller's window and asked her, quite openly, to issue two cashier's checks, each for less than $10,000, to be purchased from a single pile of currency. Nothing was hidden from either bank.

$10,000. A person might reasonably be concerned about the possibility of a crime committed against the messenger taking the money to the bank, either in terms of physical safety or of amount of loss risked. An innocent person might also be concerned about others' unfounded suspicions of one's being in an illicit business arising from the handling of so much cash at one time, not to mention the reasonable desire to avoid the inconvenience of an IRS investigation and audit, no matter how baseless.

Contrary to *Scanio, supra*, and the case law which follows it, such as the decision below, knowledge of the reporting duty imposed by 31 U.S.C. § 5313, as required by the jury instructions given at trial and as held sufficient by the majority of circuits, is not morally equivalent to the "known legal duty" standard, because § 5313 imposes no duty on the bank customer.[22] Unless the term "willfully" in § 5322(a) and (b) is construed to impose an element of knowledge that the *customer's conduct* is improper, *the customer* is indeed punished for "apparently innocent conduct." *Liparota, supra*.

There are many analogies. Some of the most common examples exist in the tax arena, where the machinations undertaken to avoid taxes can reach incredible levels of complication. (Or they may be as simple as taking out a home equity loan to pay off other debts, knowing that the interest on loans secured by one's residence is deductible, while interest on other personal loans is not.) In tax law,

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[22] In *United States v. Brown*, 954 F.2d 1563, 1568 n.1 (11th Cir.), *cert. denied*, 113 S.Ct. 284 (1992), the court said that its interpretation of "willful" as applied to § 5324(3) was "not inconsistent" with the cases involving § 5313, because both required knowledge of the reporting obligation. The argument is sophistry. The pre-§ 5324 cases involving the reporting requirement did not hold that "willful" meant "with knowledge of the reporting requirement." Rather they held that "willful" meant "with knowledge of one's legal obligations," which in § 5313 happens to involve a reporting requirement.

the distinction between "evading" a tax – illegally failing to pay it with the aid of some fraudulent contrivance – and "avoiding" the tax – structuring one's transactions so that the tax will not be due – is universally recognized. *See* 1 Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts ¶4.3.2, at 4-28 to -33 (2d ed. 1989). Some of the *Scanio* cases suggest that the distinction exists, however, only in the tax laws.

That is simply incorrect. The classic example is incorporation, whereby a sole proprietor, through the simple expedient of forming a corporation, can avoid millions of dollars in potential liability. The difference can be one of form only, maintained through minimal effort and expense. Many businesses "structure" securities offerings as purely intrastate to avoid SEC registration. Likewise, there is no Medicaid fraud in an elderly couple's using their savings to purchase a condominium when they have rented all their lives, knowing that the value of a home will not count for purposes of determining financial eligibility for nursing home reimbursements.[23] In short, many citizens, whether ordinary folks or sophisticated business people, see nothing "non-innocent" about organizing their activities to get around some particular regulation which they find inconvenient or offensive.

Despite these common analogies, numerous judges have reacted the opposite way in currency structuring cases. The reason must be that the lower courts have felt that many, or even most, people who are structuring are involved with other criminal conduct. But that difference, even were it true, could not support a different result.

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[23] As another example, spouses in community property states can circumvent the dollar limit on FDIC insurance, simply by setting up three $100,000 bank accounts with different combinations of their names, rather than one $300,000 account in both their names. Nor is there bankruptcy fraud in a debtor's selling non-exempt assets prior to filing and using the money to purchase exempt assets.

Since an ulterior criminal purpose is certainly not always present, the risk is incarcerating people whose only fault was wishing to take lawful advantage of a regulation's "loopholes." Indeed, "willfully" appears and certainly means the same in § 5322(a) as in § 5322(b), which carries twice the maximum penalty. The latter section applies whenever the structuring activity occurs, *inter alia*, "while violating another law of the United States." Stat. App. 3. Structurers with an ulterior illegal purpose are covered and severely punished in the aggravated subsection. That consideration cannot affect the construction of the term "willfully," which is common to both subsections.

The other proposition about structuring's "non-innocence," set forth somewhat more explicitly in the *Scanio* line of cases, is likewise faulty. According to these cases, an attempt to change the form of a transaction, for purposes of denying the government information, is not "non-innocent behavior," so that a *Pomponio/Cheek* level of intent would not be required. But this theory, as well, cannot be reconciled with the cases or with experience. Failure to register with Selective Service deprives the government of information, as does failure to file a tax return, failure to report the international transportation of monetary instruments, and failure to obtain an arms export license. Yet each of these offenses requires proof that the defendant knew of his or her legal obligation.

Moreover, there is the problem of simple fairness. "The criminal sanction would be used, not to punish conscious and calculated wrongdoing at odds with statutory proscriptions, but instead simply to regulate business practices regardless of the intent with which they were taken." *United States v. United States Gypsum Co.*, 438 U.S. 422, 442 (1978); *accord*, *Aversa*, *supra*, 984 F.2d at 502 (Breyer, J., concurring: discussing "the unfair result of criminally prosecuting individuals who subjectively and honestly believe they have not acted criminally").

Finally, by construing the "willfulness" requirement to require an intent to violate a known legal duty, the

Court can avoid the necessity of deciding two difficult and recurrent constitutional questions. See *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2282-84 (June 14, 1993) (compiling cases on avoidance of unnecessary constitutional issues); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1982). First is the question (pretermitted more than once before[24]) whether the Due Process Clause requires that a serious crime involve *scienter*, that is, an element of morally wrongful conduct, intentionally and knowingly performed. *See generally* Richard Singer, *The Resurgence of Mens Rea: III – The Rise and Fall of Strict Criminal Liability*, 30 B.C.L.Rev. 337, 398-403 (1989); C. Peter Erlinder, *Mens Rea, Due Process, and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law*, 9 Am.J.Crim.L. 163 (1981); Herbert Packer, *Mens Rea and the Supreme Court*, 1962 S.Ct.Rev. 107 (advancing the constitutional argument).

The Court can also avoid a second constitutional issue. In light of the extraordinary breadth of the regulatory definition of "structuring" under this statute, Stat. App. 13-14, if "purpose of evading" is construed to mean "purpose of avoiding" and "willfully" is construed to add nothing more, then a serious question arises whether § 5324 is unconstitutionally vague. (Defense counsel moved before trial to dismiss the petitioners' case on this ground.) The petitioners' argument avoids this problem as well. See *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (relationship of *mens rea* to due process analysis of vague statute); W. LaFave & A. Scott, *supra*, § 2.3(b), at 130-31 & n.34 (1986) (collecting and critiquing cases).

The interpretation of criminal structuring adopted below treats "willfully" as used in § 5322(a) and (b) as if

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[24] See *United States v. Freed*, 401 U.S. 601, 608 (1971), discussing *Lambert v. California*, 355 U.S. 225 (1957); *Smith v. California*, 361 U.S. 147, 150, 152 (1959); *Morissette v. United States*, 342 U.S. 246 (1952).

it added nothing to § 5324, and leaves the statute, when criminally enforced, without a true *scienter* requirement. For this reason as well, the decision of the Ninth Circuit should be rejected.

D. Requiring Knowledge of One's Legal Obligation, as a Component of "Willfulness," Would Not Frustrate the Congressional Purpose Behind the Anti-Structuring Statute, Particularly if that Law Is Construed to Require a True "Intent to Evade" Rather than Merely to Avoid.

Several courts, including that below, have based their conclusion in part on the idea that requiring proof that a defendant knew of the ban on structuring would frustrate Congress's goal. See *Ratzlaf*, 976 F.2d at 1284 (requiring such proof would be inconsistent with the goal of protecting the government's right to information); J.A. 61. See generally *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 26-30 (1974) (discussing purposes of Bank Secrecy Act of 1970). This Court has confronted and debunked such arguments before.

> Of course, the purpose of every statute would be 'obstructed' by requiring a finding of intent, if we assume that it had a purpose to convict without it. Therefore, the obstruction rationale does not help us to learn the purpose of the omission by congress.

Morissette v. United States, 342 U.S. 246, 259 (1952). That observation serves as well here.

1. Requiring proof of knowledge of the prohibition is consistent with the goal of reducing structuring activity.

There are several flaws in the argument that requiring proof of knowledge of one's legal duty is inconsistent with Congress's goal. First is the erroneous premise that

it would be difficult to prove knowledge of the ban on structuring. See, *e.g.*, *United States v. Dashney*, 937 F.2d 532, 539 (10th Cir.), *cert. denied*, 112 S.Ct. 402 (1991). To the contrary, such proof would be easy to obtain. It would be a simple matter for the government to post notices at banks, advising customers of the prohibition against structuring transactions. In fact, some banks already post advisements. See *United States v. Caming*, 968 F.2d 232, 234 (2d Cir. 1992). Attempts to deny knowledge in the face of such notices would pose scant barrier to conviction.[25] The "willful blindness" doctrine also protects the government against deliberate ignorance of the rules being set up to defeat the requirement of such an element. See *Spurr v. United States*, 174 U.S. 728, 735 (1899), and note 15 *ante*.

The second flaw in the "frustrate Congress's goal" argument is that it misconceives what steps actually further Congress's goal. To ensure that the government learns about cash transactions (and is not denied the information through the structuring of deposits), the essential step is to discourage structuring. But citizens cannot be discouraged from structuring unless they know that structuring is prohibited. Thus, the very step helpful for proving knowledge of the ban on structuring is also the action necessary to eliminate structuring. Informing the public about the ban on structuring would decrease

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[25] After various courts held that a willful violation of § 5316 (pertaining to reporting international transportation of currency) entailed knowledge of those requirements, the government modified Customs Form 6509-B to warn arriving travelers of the need to file a report. *United States v. Chen*, 605 F.2d 433, 435 n.3 (9th Cir. 1979). Departing travelers are frequently advised of the requirement by public address announcements, or by the prominent display of large color posters throughout airport departure areas, *United States v. Dichne*, 612 F.2d 632 (2d Cir. 1979), and at border crossings. *United States v. Salinas-Garza*, 803 F.2d 834 (5th Cir. 1986).

the incidence of structuring and readily allow conviction of those individuals who willfully structure despite their knowledge that their action is prohibited.[26] But imprisoning people who structure when they think it is permissible does not further Congress's goal at all. It neither helps to stop further structuring nor does it give the government additional information, except, of course, through the general deterrent effect – but that refers to others' learning of the ban from the fact that some have been imprisoned, which is surely the least efficient way to notify the general public.

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[26] The Treasury Department proposed, but failed to adopt, regulations to publicize the anti-structuring provision. 53 Fed.Reg. 7,948 (1988); 54 Fed.Reg. 20,398 (1988). The Department's explanation for the withdrawal of the proposal was this:

> Treasury's position continues to be that the law and legislative history are clear on this issue, that is, that the government need only prove that a criminal defendant had actual knowledge of the currency reporting requirements and the specific intent to evade them; the government need not prove that the defendant had knowledge of the structuring prohibitions.

Id. The comment makes no mention of the impact of a conscious policy *not* to inform affected individuals of the applicable law on either civil enforcement or the risk of forfeitures. This history suggests that the Department has set out to use the anti-structuring law not as a tool to stop people from structuring, but rather as a device to catch people structuring their transactions, regardless of their lack of knowledge of wrongdoing, apparently in the belief that such people must also be up to something else illegal, be it illegal gambling, drug dealing or some other cash-generating illicit enterprise, or merely tax evasion.

2. The term "evading" in § 5324 is better read as requiring true evasion and not mere avoidance.

Congress's choice of the term "evading" in § 5324 is significant in this context, as that term carries with it a large and well-settled body of law from tax evasion prosecutions under 26 U.S.C. § 7201, in which the evasion/avoidance distinction is fundamental. Yet the court below, in keeping with all the circuits, treated "evading" in the anti-structuring statute as if it meant no more than "avoiding,"[27] as does the Treasury's regulation defining the term "structure" as used in the regulatory equivalent to § 5324. *See* 31 C.F.R. §§ 103.11(p), 103.53; Stat.App. 13-15. This was error which exacerbated the effect of the erroneous construction of "willful" as used in § 5322.

When Congress uses a term with a well-recognized legal meaning, it is presumed to intend the use of that term in the sense that educated lawyers would understand it at the time of enactment. See, *e.g.*, *Taylor v. United States*, 495 U.S. 575, 592-94 (1990) ("burglary" in 1984); *McNally v. United States*, 483 U.S. 350, 358-59 (1987) ("fraud" in 1874); *Perrin v. United States*, 444 U.S. 37, 43-45 (1979) ("bribery" in 1961). The term "evade," used in the present context, has such a history and was still consistently used to mean something different from "avoid" in 1986. *See* Bittker & Lokken, *supra*; Harry Balter, Tax Fraud and Evasion ¶2.01, at 2-2 through 2-9 (5th ed. 1983). This Court first recognized the distinction between evasion and avoidance over a century ago in a criminal case which eerily foreshadows the present controversy.

In *United States v. Isham*, 17 Wall. (84 U.S.) 496 (1873), a businessman was indicted under the Civil War internal

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[27] But *cf. United States v. Baydoun*, 984 F.2d 175 (6th Cir. 1992) ("purpose of evading" element requires proof that defendant knew CTR filing was required by law, not merely by bank policy).

revenue act for issuing a series of drafts without the required tax stamps and "with intent to evade the provisions of" the Act. *Id.* at 496-97. That law required a two cent stamp to be purchased and affixed to any draft drawn upon a bank, and to any draft for a sum exceeding $10 drawn upon any other kind of company. Isham, superintendent of a mining operation in a remote area of Michigan, issued drafts drawn on the company in amounts of $1 to $10, which circulated as money in the area. No higher denominations were issued, even though merchants sometimes acquired $1000 to $2000 of them, and about $100,000 worth were issued during a year.

This Court agreed that no offense was stated under the "evasion" language of the statute and directed dismissal of the charges:

> It is said that the transaction proved upon the trial in this case, is a device to avoid the payment of a stamp duty, and that its operation is that of a fraud upon the revenue. This may be true, and if not true in fact in this case, it may well be true in other instances. To this objection there are two answers:
>
> 1st. That if the device is carried out by the means of legal forms, it is subject to no legal censure. To illustrate. The Stamp Act of 1862 imposed a duty of two cents upon a bank check, when drawn for an amount not less than twenty dollars. A careful individual, having the amount of twenty dollars to pay, pays the same by handing to his creditor two checks of ten dollars each. He thus draws checks in payment of his debt in the amount of twenty dollars, and yet pays no stamp duty. This practice and this system he pursues habitually and persistently. While his operations deprive the government of the duties it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. He resorts to devices to avoid

> the payment of duties, but they are not illegal. He has the legal right to split up his evidences of payment, and thus to avoid the tax. The device we are considering is of the same nature.

Id. at 506. In *Isham*, as here, deliberate but forthright avoidance of the form of transaction regulated by the law does not amount to "evasion." See also *Bullen v. Wisconsin*, 240 U.S. 625, 630-31 (1916) (Holmes, J.).

The proposed construction of "evading" as having its usual meaning is also consistent with another, related crime created by Congress at the same time. Several subsections of 18 U.S.C. § 1956(a) use the phrase "designed . . . to *avoid* a transaction reporting requirement" to describe certain prohibited financial transactions which are deemed to constitute money laundering, Stat. App. 6-8, while 31 U.S.C. § 5324 uses the phrase "for the purpose of *evading*." The use of different terminology to describe related ideas in these related statutes enacted as part of the same subtitle of the 1986 Act strongly suggests that they were intended to have different meanings. That difference can only be the traditionally recognized avoidance/evasion distinction.

The construction adopted below leads to the conviction of a legitimate merchant, with gross receipts of tens of thousands per week, but well under $10,000 per day received in currency, simply for *avoiding* the filing of CTR's by making more rather than less frequent bank deposits. See *United States v. Shirk*, 981 F.2d 1382 (3d Cir. 1992), *cert. pending*, No. 92-1841. Yet according to a leading treatise:

> the Justice Department does not suggest that it would be a violation of this Subsection (3) for a depositor to arrange his activities so that he never *accumulates* a reportable sum for deposit in a financial institution. . . . This argument is reinforced by the absence of legislative history which indicates that Congress intended to reach this type of avoidance activity.

J. Villa, Banking Crimes § 6.05[1][c][ii], at 6-65 (Dec. 1992 rev.) (referring to U.S. Justice Dept., Handbook on the Anti-Drug Abuse Act of 1986, at 81-87 (1987)). Under the construction of "structures . . . for the purpose of evading" followed below, however, there is no impediment to such a prosecution.[28]

The facts of Shirk's case, involving a prosecution for "structuring" the legitimate receipts of his lawful business into his own business account, like those of the defendants' in *Aversa*, demonstrate the absurd consequences of adopting the majority view of this statute. "Evading" should be construed to mean what it says.

E. Examination of the Entire Statutory Scheme, Including Related Statutes Enacted at the Same Time, Leads to the Conclusion that "Willfully" Means "With Intent to Violate a Known Legal Duty."

In the Money Laundering Control Act of 1986, which is Title I, Subtitle H, of the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, §§ 1351-1367, 100 Stat. 3207-18, Congress created four new remedies to attack what it perceived as the problem of structuring transactions for the purpose of evading the currency reporting requirements under the Bank Secrecy Act – forfeiture (Act § 1366, creating 18 U.S.C. §§ 981-982), civil penalties (Act § 1357(a), adding

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[28] As the Eleventh Circuit recently recognized, "When a person conducts cash transactions in amounts of less than $10,000 because he or she has a legitimate reason to do so, no conspiracy to structure occurs." *United States v. Brown*, 954 F.2d 1563, 1571 (11th Cir.) (*citing* S.Rep. No. 433, 99th Cong., 2d Sess. 22 (1986)), *cert. denied*, 113 S.Ct. 284 (1992). Under *Shirk*-type circumstances, at least, no inference of improper structuring could be drawn from the pattern and amounts of the deposits alone, because the proof would not make out the required "purpose of evading," as opposed to mere "avoiding" of the reporting requirement.

subsection (a)(4) to 31 U.S.C. § 5321), criminal prosecution for structuring (Act § 1354, creating 31 U.S.C. § 5324), and criminal prosecution for money laundering (Act § 1352, creating 18 U.S.C. §§ 1956(a)(1)(B)(ii), (a)(2)(B)(ii)). Examining these *in pari materia*, in their relationship to one another[29], gives further insight into the meaning of "willfulness" in 31 U.S.C. § 5322 when used in criminal enforcement of § 5324. See generally *Spies v. United States*, 317 U.S. 492, 495-97 (1943) (analyzing meaning of "attempt to evade" in 26 U.S.C. § 7201 by placing attempted criminal tax evasion in a hierarchy of tax enforcement devices).

Civil forfeiture to the United States under 18 U.S.C. § 981(a)(1)(A), Stat. App. 5, is available for any "violation" of 31 U.S.C. § 5324, without regard to intent, subject only to an "innocent owner" defense. *See* 18 U.S.C. § 981(a)(2). The civil enforcement mechanism for the anti-structuring prohibition, however, applies only to violations committed "willfully."[30] The civil remedy is imposition by the Treasury Department of a "money penalty" in an amount not to exceed the value of the coins and currency "involved in the [offending] transaction," 31 U.S.C. § 5321(a)(4)(B), reduced by the amount of any forfeiture. *Id.*(a)(4)(C). Civil and criminal penalties may be imposed on account of the same transaction. *Id.*(c), added by Act § 1357(f). Stat. App. 1-2.

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[29] *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990) ("at least reasonable, if not necessary" that different sections of same Act be read *in pari materia*); *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 n.11 (1985) (various provisions of same Act should be read *in pari materia*); *cf. Gozlon-Peretz v. United States*, 498 U.S. 395, 407-08 (1991).

[30] The Act also created a separate, civil penalty for negligent violation of the currency reporting requirement, applicable only to financial institutions. Act § 1357(d). We exclude it from the hierarchy of penalties here, because it is not applicable to bank customers. Stat. App. 2.

Since, as discussed throughout this brief, the criminal penalty also depends on a finding of "willfulness," under *id.* § 5322(a) or (b), the question naturally arises whether the mental state was intended to be the same for civil liability as for criminal. This Court need not decide that question in this case, but the legislative history strongly supports the view that it was not. The official Treasury statement to the Senate Committee explains that "willful violations," under the civil penalty provision, are "violations made with specific intent or with reckless disregard for the law." S.Rep. No. 433, 99th Cong., 2d Sess. 26 (1986) (letter from Francis A. Keating II, Asst. Sec'y (Enforcement), Dept. of Treas., to Chairman Thurmond). Congress did not change that language in 1986, which imposes the same standard for "willfulness" that this Court has recently found to apply in other civil penalty contexts. See *Hazen Paper Co. v. Biggins*, 507 U.S. ___, 123 L.Ed.2d 338, 349-51 (April 20, 1993) (Age Discrimination in Employment Act); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (Fair Labor Standards Act); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (ADEA).

In those cases, this Court determined that "willfulness" in the civil context means either actual knowledge of the applicable legal rules or "reckless disregard for the matter of whether [one']s conduct was prohibited by the statute." *Hazen Paper, supra*, 123 L.Ed.2d at 350, quoting *McLaughlin, supra*, 486 U.S. at 133. It would "surely" be "a fair reading of the plain language of the statute," *id.*, supported by the legislative history just mentioned, to adopt that construction for § 5321 as well. While it has the disadvantage of reading the same term, "willfully," in two different occurrences in the same statute as meaning two somewhat different things, that result can be readily justified. See *United States v. Thompson/Center Arms Co., supra*, 119 L.Ed.2d at 316 n.5 ("normal canons of construction caution us . . . , *unless there is a good reason*, to adopt a consistent interpretation of a term used in more than one

place within a statute") (emphasis added). A dual standard of "willfulness" as between § 5321 and § 5322 is consistent with the different ways that term has been used in civil penalty, as opposed to criminal, statutes. It also is consistent with the legislative history. Finally, it has the policy advantage of enforcing a distinction between a civil and a felonious violation of § 5324.[31]

Moreover, at the same time it enacted § 5324, Congress created two new true money laundering offenses, 18 U.S.C. § 1956(a)(1)(B)(ii) and (a)(2)(B)(ii), which penalize with up to 20 years' imprisonment behavior known to be "designed" to "*avoid* a transaction reporting requirement," but only if engaged in with property known to "represent" criminally derived funds. *See* G. Richard Strafer, *Money Laundering: the Crime of the '90's*, 27 Am.Crim.L.Rev. 149, 189-93 (1989). In a prosecution under § 1956 the defendant's blameworthy dealings with what are known to be proceeds of illegal activity supply an element of graver moral culpability than applies in a criminal case under sections 5324 and 5322, even if knowledge that one is violating the law is implied in the latter's "willfulness" element.

To fit a criminal case under § 5324 into the hierarchy of enforcement options between a § 5321 civil penalty action and a § 1956 money laundering indictment, it is necessary to read the "willfulness" element under § 5322 as requiring a level of intent above that necessary for a

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[31] This construction, which differentiates civil "willfulness" from criminal, has the added advantage of demonstrating that Congress did not grant unfettered and lawless enforcement discretion to the Executive to choose between civil and criminal penalties for the same conduct, undertaken with the same state of mind.

civil penalty.[32] That standard is intentional violation of a known legal duty.

F. Legislative History Does Not Support the Application of a Lower Standard of Intent.

There is no Senate or House Report directly discussing what is now § 5324. Those parts of the Congressional reports which deal with different bills that would have made the *act* of structuring illegal for the first time do not discuss the question of intent. As recognized by the Tenth Circuit, "criminal intent is not specifically addressed" in the legislative history of the 1986 amendments to the Bank Secrecy Act. *United States v. Dashney, supra,* 937 F.2d at 538; *accord,* J.A. 68 n.8 (decision below).

The legislative history clearly demonstrates Congress's awareness of the case law on § 5322. S.Rep. No. 433, 99th Cong., 2d Sess. 21 (1986); H.Rep. No. 746, 99th Cong., 2d Sess. 18-19 (1986). Indeed, as the court noted in *Aversa,* both Houses, in the drafting process, rejected alternatives to adoption of § 5322 as the mental state which would have changed the "willfully" standard to "knowingly," even though the reports on those proposals state that the change of terminology was intended to clarify not lower the intent requirement. 984 F.2d at 499-500 n.8; *see* H.Rep. No. 855, 99th Cong., 2d Sess. 7, 21-22 (1986) and H.Rep. 99-746, *supra,* at 28-29, 41. That history, while supportive of the inference that Congress adopted and carried forward the established definition of "willfully" under the existing cases, would probably not be enough to overcome clear statutory language that a

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[32] In *Aversa,* the *in banc* First Circuit majority adopted the *Thurston/McLaughlin* test as a definition of "willfulness" in criminal cases under § 5324. 984 F.2d at 498-500. That result fails to deal with the argument advanced above, at the least, and so we do not propound it. However, if this Court agrees with the First Circuit, reversal would still be required here, as the jury instruction fell far short of that standard.

conviction under § 5324(3) did not require knowledge, if such language existed. Here, however, as discussed under Point A of this Brief, the language shows that more is required than an intent to evade.

The legislative history also reflects Congress's awareness of a split in the circuits, with some cases holding that structuring was a crime under existing statutes; see, *e.g., United States v. Tobon-Builes,* 706 F.2d 1092 (11th Cir. 1983); and others holding that it was not; see, *e.g., United States v. Anzalone,* 766 F.2d 676 (1st Cir. 1985). Section 5324 was enacted to make clear that the conduct which had been held by some circuits to be unprosecutable under prior law (various combinations of 18 U.S.C. §§ 2, 371 and 1001, coupled with the Bank Secrecy Act provisions which impose duties on financial institutions alone) could be punished.

Several of the appellate decisions have seized upon what is, at most, an "implicit" reference, *Dashney, supra,* to the issue presented here. Discussing a proposed amendment to § 5313(a), which would have criminalized "structuring . . . a transaction to evade" a reporting requirement, S.Rep. 99-433, *supra,* at 21, the Senate Judiciary Committee wrote:

> For example, a person who converts $18,000 in currency to cashier's checks by purchasing two $9,000 cashier's checks at two different banks or on two different days with the specific intent that the participating bank or banks not be required to file Currency Transaction Reports for those transactions, would be subject to potential civil and criminal liability.

Id. at 22. Because this example does not mention knowledge of the anti-structuring provision, some courts, including the Ninth Circuit below, J.A. 67-68, have contended that it supports their holdings. See, *e.g., Dashney, supra,* 937 F.2d at 538; *Scanio, supra,* 900 F.2d at 491. This comment falls short of an unambiguous endorsement of

the decision below. This conclusion is supported by the Committee's qualification of its statement in the $18,000 example by mentioning "potential" criminal and civil liability. That "potential" only becomes *actual* when "willfulness" is added.

The quoted example immediately follows this statement: "[T]he proposed amendment would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act." *Id.* This comment, while describing the act eventually prohibited under § 5324(3), also omits any reference to the "willful" requirement for criminal convictions under § 5322. Both comments are best seen as a general discussion of what is prohibited, rather than as a detailed analysis of the intent and knowledge elements of the crime.[33] *See* Welling, *supra*, 41 Fla.L.Rev. at 288 (supporting holding below, but conceding that statute was adopted "quickly and without careful analysis").

This Court faced an almost identical argument in *Liparota, supra*, where the legislative history stated that any unauthorized use of food stamps could be prosecuted. The government cited this comment to support its claim that conviction did not require proof of knowledge that a use was unauthorized. This Court responded:

> We do not believe that the omission of the word 'knowingly' is evidence that Congress devoted its attention to the issue before the Court today; it is as likely that the Committee, unaware of the

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[33] Furthermore, even putting aside the problems discussed above in the resort to legislative history, the argument does not answer the issues posed in Points A and B above regarding the wording of the statute: if willfulness is mere intent to evade, then how does a willful violation of § 5324(3) differ from a non-willful violation, and how can a single occurrence of the same term mean two different things?

> problem, simply did not realize the need to discuss the mental element needed for a conviction under § 2024(b)(1).

471 U.S. at 431 n.13. Here, too, the failure to mention the willfulness element is not evidence that Congress rejected that element. More likely, Congress was well aware that the courts already had consistently found the "willfully violates" language in § 5322 to require knowledge of the particular provision violated, and this example was simply describing the terms of the new provision. The most that could be said after examination of the legislative history is that it leaves the statutory language ambiguous.[34]

The proper definitions of "transaction," "structuring," "evading" and "willfully," at least, are not clear under this law. Accordingly, the rule of lenity requires that none of them be construed so as to extend criminal liability where, as here, there is no clear indication that Congress intended it to exist. *Liparota, supra*, 471 U.S. at 428-29 (applying rule of lenity to resolve definition of *mens rea*); *cf. United States v. Thompson/Center Arms Co., supra*, 504 U.S. ___, 119 L.Ed.2d at 319-20 & n.10 (plurality) and *id.* at 320, 323 (concurring opinion) (applying rule to non-complex tax, because provision is also criminally-enforceable). "At the very least," as the Chief Justice has written, where "the issue is subject to some doubt," the Court will "adhere to the familiar rule that, 'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.' " *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1978) (quoting

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[34] In any event, legislative history may not be invoked to defeat the operation of the rule of lenity in the construction of a criminal statute. *United States v. R.L.C.*, 503 U.S. ___, 117 L.Ed.2d 559, 573-77 (March 24, 1992) (Scalia, J., concurring in the judgment with Kennedy & Thomas, JJ.).

United States v. Bass, 404 U.S. 336, 348 (1971)).[35] See also *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

In *McNally v. United States*, 483 U.S. 350, 359-60 (1987), this Court stated that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." Where, as here, there is at least legitimate doubt as to the meaning of the term "willfully" in § 5322(a) and (b) or the term "evade" in § 5324, then that doubt must be resolved in favor of the criminally accused.

G. The Error in Instructing the Jury Was Both Inherently and Actually Prejudicial.

For all the foregoing reasons, there was fundamental error in the trial court's instructions to the petitioners' jury. This Court has consistently held that "matters of intent are for the jury to consider." *McCormick v. United States*, 500 U.S. ___, 114 L.Ed.2d 307, 324 (May 23, 1991).[36] The judgment below must necessarily be "set aside and a new trial ordered." *Id.*

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[35] See also, *e.g.*, *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Tanner v. United States*, 483 U.S. 107, 131-32 (1987); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). The rule of lenity is "an outgrowth of [this Court's] reluctance to increase or multiply punishments absent a clear and definite legislative directive." *Busic v. United States*, 446 U.S. 398, 406-07 (1980). "The rule is also the product of an awareness that legislators and not the courts should define criminal activity" and allowable punishments. *Huddleston v. United States*, 415 U.S. 814, 831 (1974).

[36] Indeed, a significant misstatement of the elements of a criminal offense, including the mental element, or of what facts may establish the offense, constitutes plain error. *Pipefitters Local 562 v. United States*, 407 U.S. 385, 440-42 & n.52 (1972); *Screws v. United States*, 325 U.S. 91, 107 (1945) (plurality).

Even if prejudice needed to be shown, it is clear that the error in instructing on the intent element in this case was severely prejudicial. Viewed in the light most favorable to the government, the evidence showed that petitioners at some point after purchasing cashier's checks at Nevada Banking Company may have become aware of the banks' reporting obligations with respect to aggregation of related transactions and deliberately thereafter conducted cash transactions to obtain cashier's checks so that the banks would not know they should file CTRs. But no evidence showed that either petitioner knew structuring was illegal.

Congress did not intend the conduct proven in this case to be treated as a crime, and no crime was proven. In addition to the four structuring counts, the counts charging conspiracy and interstate travel must fall as well, since each of them incorporates a purpose to commit criminal structuring. The jury instructions presented this case on a prejudicially low standard of criminal intent. At least a new trial is required as the remedy.

CONCLUSION

For each of the foregoing reasons, petitioners Waldemar and Loretta Ratzlaf pray that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit affirming their convictions and sentences, and direct the court of appeals to remand for a new trial or other appropriate proceedings.

Respectfully submitted,

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

The Currency and Foreign Transactions Reporting Act, part of the Bank Secrecy Act of 1970, Pub.L. 91-508, tit. II, 84 Stat. 1118, codified at 31 U.S.C. § 5313, provides, in part:

> (a) when a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. . . .

The civil enforcement provision states, in pertinent part:

§ 5321. Civil penalties

(a) . . . .

* * *

> **(4) Structured transaction violation.–**
>
> (A) **Penalty authorized.** – The Secretary of the Treasury may impose a civil money penalty on any person who willfully violates any provision of section 5324.
>
> (B) **Maximum amount limitation.** – The amount of any civil money penalty imposed under subparagraph (A) shall not exceed the amount of the coins and currency (or such other

monetary instruments as the Secretary may prescribe) involved in the transaction with respect to which such penalty is imposed.

(C) **Coordination with forfeiture provision.** – The amount of any civil money penalty imposed by the Secretary under subparagraph (A) shall be reduced by the amount of any forfeiture to the United States in connection with the transaction with respect to which such penalty is imposed.

* * *

(6) **Negligence.** –

(A) **In general.** – The Secretary of the Treasury may impose a civil money penalty of not more than $500 on any financial institution which negligently violates any provision of this subchapter or any regulation prescribed under this subchapter.

(B) **Pattern of negligent activity.** – If any financial institution engages in a pattern of negligent violations of any provision of this subchapter or any regulation prescribed under this subchapter, the Secretary of the Treasury may, in addition to any penalty imposed under subparagraph (A) with respect to any such violation, impose a civil money penalty of not more than $50,000 on the financial institution.

* * *

(d) **Criminal penalty not exclusive of civil penalty.** – A civil money penalty may be imposed under subsection (a) with respect to any violation of this subchapter notwithstanding the fact that a criminal penalty is imposed with respect to the same violation.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 999; Pub.L. 98-473, Title II, § 901(a), Oct. 12, 1984, 98 Stat. 2135; Pub.L. 99-570, Title I, §§ 1356(c)(1), 1357(a)-(f), (h), Oct. 27, 1986, 100 Stat. 3207-24, 3207-25, 3207-26; Pub.L. 100-690, Title VI, § 6185(g)(2), Nov. 18, 1988, 102 Stat. 4357; Pub.L. 102-550, Title XV, §§ 1511(b), 1525(b), 1535(a)(2), 1561(a), Oct. 28, 1992, 106 Stat. 4057, 4065, 4066, 4071.)

The criminal enforcement provision, codified at 31 U.S.C. § 5322, states, in pertinent part:

> (a) A person willfully violating this subchapter or a regulation prescribed under this subchapter . . . shall be fined not more than $250,000, or imprisoned for not more than five years, or both.
>
> (b) A person willfully violating this subchapter or a regulation prescribed under this subchapter . . . , while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned not more than 10 years, or both.
>
> * * *

The Anti-Drug Abuse Act of 1986, Pub.L. 99-570, tit. I, subtit. H (Money Laundering Control Act of 1986), § 1354(a), 100 Stat. 3207-22, amended the Currency and Foreign Transactions Reporting Act by adding the following section:

§ 5324. Structuring transactions to evade reporting requirement prohibited

No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction –

> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

31 U.S.C. § 5324 (as added October 27, 1986, effective January 27, 1987), recodified in 1992 as § 5324(a).

Related provisions of the federal criminal code include civil and criminal forfeiture provisions and a criminally-enforced prohibition on money laundering, which state, in pertinent part:

§ 981. Civil forfeiture

(a)(1) Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:

> (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.
>
> * * *

§ 982. Criminal forfeiture

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316 or 5324 of title 31, or of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the

Securities and Exchange Commission or a partner, director, or employee thereof.

* * *

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to

or through a place outside the United States or to a place in the United States from or through a place outside the United States –

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law.

shall be sentenced to a fine of $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent –

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1), or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of –

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) $10,000.

(c) As used in this section –

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property

involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificates of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or

(ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" has the definition given that term in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder;

(7) the term "specified unlawful activity" means –

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving –

(i) the manufacture

(ii) kidnaping, robbery, or extortion; or

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978;

[1]importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

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[1] So in original.

(D) an offense under section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 875 (relating to interstate communications), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking) section 1708 (theft from the mail, section 2113 or 2114 (relating to bank and postal robbery and theft), or section 2319 (relating to copyright infringement), of this title, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff

Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 9(c) of the Food Stamp Act of 1977 (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, or any felony violation of the Foreign Corrupt Practices Act; or

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.).

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

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(Added Pub.L. 99-570, Title XIII, § 1352(a), Oct. 27, 1986, 100 Stat. 3207-18 and amended Pub.L. 100-690, Title VI,

§§ 6183, 6465, 6566, 6469(a)(1), 6471(a), (b), Title VII, § 7031, Nov. 18, 1988, 102 Stat. 4354, 4375, 4377, 4378, 4398; Pub.L. 101-647, Title I, §§ 105-108, Title XII, § 1205(j), Title XIV, §§ 1402, 1404, Title XXV, § 2506, Title XXXV, § 3657, Nov. 29, 1990, 104 Stat. 4791, 4792, 4831, 4835, 4862, 4927; Pub.L. 102-550, Title XV, §§ 1504(c), 1524, 1526(a), 1527(a), 1530, 1531, 1534, 1536, Oct. 28, 1992, 106 Stat. 4055, 4064, 4065, 4066, 4067.)

The Treasury Department's implementing regulations, 31 C.F.R., part 103, provide, in pertinent part:

§ 103.11 Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

* * *

(e) **Currency.** The coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance. Currency includes U.S. silver certificates, U.S. notes and Federal Reserve notes. . . .

* * *

(p) **Structure (structuring).** For purposes of section 103.53, a person structures a transaction if that person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading

the reporting requirements under section 103.22 of this Part. "In any manner" includes, but is not limited to, the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000 or the conduct of a transaction, or series of currency transactions, including transactions at or below $10,000. The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition.

103.21 Determination by the Secretary.

The Secretary hereby determines that the reports required by this sub-part have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

103.22 Reports of currency transactions.

(a)(1) Each financial institution other than a casino or the Postal Service shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling[2] more than $10,000 during any one business day. Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following deposit.

(2) Each casino shall file a report of each deposit, withdrawal, exchange of currency, gambling tokens or chips, or other payment or

transfer, by, through, or to such casino which involves a transaction in currency of more than $10,000. Multiple currency transactions shall be treated as a single transaction if the casino has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling[2] more than $10,000 during any twenty-four hour period.

* * *

§ 103.53 Structured transactions.

No person shall for the purpose of evading the reporting requirements of § 103.22 with respect to such transaction:

(a) Cause or attempt to cause a domestic financial institution to fail to file a report required under § 103.22;

(b) Cause or attempt to cause a domestic financial institution to file a report required under § 103.22 that contains a material omission or misstatement of fact; or

(c) structure (as that term is defined in § 103.11(n) [sic; apparently meaning (p)] of this Part) or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

[52 FR 11446, Apr. 8, 1987, as amended at 54 FR 3027, Jan. 23, 1989]

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[2] So in original.